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No. 03-1214

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

ALLSTATE CORPORATION, *et al.*,
Petitioners,

v.

JOSE DEHOYOS, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Fifth Circuit correctly held that respondents' federal civil rights claim for disparate racial impact (42 U.S.C. § 3604) is not preempted by the McCarran-Ferguson Act (15 U.S.C. § 1012(b)), because the federal claim complements and does not frustrate, conflict or interfere with state insurance laws, policies or regulatory regimes when:

(i) no state regulator objected to respondents' suit, Allstate never disclosed its credit formula to Florida or Texas insurance regulators, and neither state regulated credit scoring as part of its oversight of insurance ratemaking, but at most had initiated investigations to determine whether to regulate such credit practices, and

(ii) both Florida and Texas law prohibit insurance sales practices that are racially discriminatory, and permit private suits for race discrimination in insurance, including disparate impact suits under local fair housing acts that are modeled on §3604, and the complaint alleges that Allstate's credit formula is ***not*** race-neutral.

PARTIES

Respondents Jose C. DeHoyos, Eva Perez-DeHoyos, Georgia Harrison, Charles White, Sheryl H. Franks, and Martel Shaw, who were plaintiffs and appellees below, are non-Caucasian policyholders of petitioner Allstate's automobile and homeowners insurance policies. Respondents sued Allstate Corporation, et al., for intentional and disparate impact racial discrimination in the sale of insurance.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES	ii
TABLE OF AUTHORITIES	v
INTRODUCTION	1
STATEMENT OF THE CASE	6
REASONS FOR DENYING CERTIORARI PETITION	10
A. The Question Presented by the Petition Is Not of Exceptional Importance, Nor Does the Record Raise the Question Presented, When Allstate Has Never Disclosed Its Race-Based Credit Formula to State Regulators, and No State Objected that Respondents' Suit Interfered with Its Regulatory Regime	10
B. Plaintiffs' Disparate Impact Claim Under 42 U.S.C. § 3604 Is Not Preempted When State Laws Also Permit Private Discrimination Suits, Including Disparate Impact Claims Under State Fair Housing Laws Modeled on the Federal Statute	13
C. The Fifth Circuit Correctly Applied This Court's Decision in Humana in Holding that Plaintiffs' Federal Civil Rights Claims Complement, and Do Not Frustrate, Conflict or Interfere with State Regulators Whose Laws Also Prohibit Race Discrimination in Insurance Sales	16

TABLE OF CONTENTS—Continued

Page

D. The Fifth Circuit Decision Is Consistent with the Decisions of the Fourth, Sixth, Seventh and Eleventh Circuits and the Conflict Alleged to Exist with the Seventh and Third Circuits Does Not Exist 17

CONCLUSION 19

TABLE OF AUTHORITIES

CASES

	Page
Attorney General of Texas v. Allstate Ins. Co., 687 S.W.2d 803 (Tex. App. 1985)	14
Doe v. Mutual of Omaha Ins. Co., 179 F.3d 557 (7th Cir. 1999)	*passim*
Doe v. Mutual of Omaha Ins. Co., 999 F. Supp. 1188 (N.D. Ill. 1998)	18
Dornbach v. Holley, 854 So. 2d 211 (Fla. App. 2002)	4, 15
Federated Department Stores, Inc. v. Moitie, 452 U.S. 394 (1981)	3
Ford v. Schering-Plough Corp., 145 F.3d 601 (3d Cir. 1998)	18
Glover v. United States, 531 U.S. 198 (2001)	6, 12
Humana Inc. v. Forsyth, 525 U.S. 299 (1999)	*passim*
Leatherman v. Tarrant County Narcotics Intelligence & Coordination, 507 U.S. 163 (1993)	5
Loren v. Sasser, 309 F.3d 1296 (11th Cir. 2002), *cert. denied*, 538 U.S. 930 (2003)	15
Mackey v. Nationwide Ins., 724 F.2d 419 (4th Cir. 1984)	19
McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)	3, 12
Meadowbriar Home for Children v. Gunn, 81 F.3d 521 (5th Cir. 1996)	15
Moore v. Liberty Nat'l Life Ins. Co., 267 F.3d 1209 (11th Cir. 2001)	16, 17
NAACP v. American Family Mut. Ins. Co., 978 F.2d 287 (7th Cir. 1992)	4, 17
Nationwide Mut. Ins. Co. v. Cisneros, 52 F.3d 1351 (6th Cir. 1995)	19
Owens v. Okure, 488 U.S. 235 (1989)	12
Patterson v. McLean Credit Union, 491 U.S. 164 (1989)	12

TABLE OF AUTHORITIES—Continued

	Page
Scheuer v. Rhodes, 416 U.S. 232 (1974)	5, 11
United Farm Bureau Mut. Ins. Co. v. Metropolitan Human Relations Com'n, 24 F.3d 1008 (7th Cir. 1994)	4, 17
Washington v. Davis, 426 U.S. 229 (1976)	3, 12
Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979)	6
Watson v. Fort Worth Bank & Trust, 487 U.S. 977 (1988)	3
Yohey v. Collins, 985 F.2d 222 (5th Cir. 1993)	6, 12

STATUTES RULES AND REGULATIONS

15 U.S.C.	
§ 1012(b)	1, 8, 16, 17
28 U.S.C.	
§ 1292(b)	8
42 U.S.C.	
§ 1981	*passim*
§ 1982	*passim*
§ 3604	*passim*
Florida Statutes	
§ 624.155	13
§ 624.155(1)(a)	4, 13
§ 624.155(7)	4, 13
§ 626.9541(1)(x)	4, 13
§ 626.9631	4, 13
§ 626.9741(4)(a)	15
§ 760.35	3, 14
Texas Insurance Code	
art. 21.21 § 8	*passim*
art. 21.21-6 § 3(a)	4, 14, 15, 18
art. 21.21-6 §§ 3(b)(c)	14

TABLE OF AUTHORITIES—Continued

	Page
art. 21.21-6 § 4(a)	14, 18
art. 21.21-8	14
art. 21.49-2U § 3(a)(1)	15
Texas Property Code	
§ 301.002(3)	3, 15
§ 301.151	3

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BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

INTRODUCTION

Respondents filed a federal civil rights suit against petitioners alleging that Allstate used race-based credit scoring to place non-Caucasians in higher premium auto and homeowners insurance policies. Respondents advanced claims for intentional discrimination under 42 U.S.C. §§ 1981, 1982 and 3604, and an alternative claim of disparate impact discrimination under § 3604.

Allstate moved to dismiss on the ground that all of respondents' claims were preempted by the McCarran-Ferguson Act (15 U.S.C. § 1012(b)) (the "Act"), assertedly because the claims would interfere with insurance ratemaking regulation by the states of Florida and Texas. Allstate's motion was denied by the district court. The Fifth Circuit

affirmed unanimously on the intentional claims, with one judge dissenting on the disparate impact claim. The lower courts reasoned that under this Court's decision in *Humana Inc. v. Forsyth*, 525 U.S. 299, 309-12 (1999), preemption was not justified just because the states regulated the "field" of insurance ratemaking. The Fifth Circuit concluded that, at the pleading stage, Allstate had not identified in the record any state law, policy, regulation or regime that required or condoned the use of credit scoring to place non-Caucasians in higher premium policies than Caucasians. (App. 10a-12a)

In its petition, Allstate abandons its efforts to preempt respondents' intentional discrimination claims under §§ 1981, 1982 and 3604, and seeks certiorari only on respondents' alternative disparate racial impact claim under § 3604. Certiorari is unwarranted in this case for the following reasons:

First, the question presented is not an issue of exceptional importance. Employing overheated rhetoric, Allstate repeatedly asserts that allowing respondents to pursue their disparate impact claim will cause a "momentous," "enormous," "dramatic," "revolution[ary]" disruption of state insurance regulation. (Pet. 13, 15-17, 21) Allstate (and its insurance industry *amici*) raised the same parade of horribles in the lower courts to respondents' intentional discrimination claims, but abandons those objections here. If Allstate's "fears" had any basis, one would have expected state regulators to intervene and object—but none did in the district court or the Fifth Circuit. In *Humana*, this Court found it significant that the state "filed no brief at any stage of this lawsuit urging that application of [federal law] to the alleged conduct would frustrate any state policy, or interfere with the state's administrative regime." *Humana*, 525 U.S. at 313. The . Act protects state regulators—not insurance companies (especially ones that engage in race discrimination). In previous cases, this Court has treated "sky-is-falling" rhetoric like Allstate's with skepticism: "We

do not believe that disparate impact theory need have any chilling effect on legitimate business practices." *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 993 (1988).

By focusing on disparate impact, Allstate hopes to avoid disclosure of its race-based credit formula. But, Allstate cannot avoid judicial scrutiny of the disparate impact of its credit practices even if this suit alleged only intentional discrimination. "Necessarily, an invidious discriminatory purpose may often be inferred from the totality of relevant facts, including the fact, if it is true, that the . . . [conduct alleged] bears more heavily on one race than another." *Washington v. Davis*, 426 U.S. 229, 242 (1976). In an intentional discrimination case, once plaintiffs present a prima facie case, the defendant must show a legitimate business justification for its practices, but plaintiffs then have the opportunity to prove that the justification is a pretext for racially discriminatory conduct. *E.g., McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-05 (1973). Thus, both disparate impact and business necessity would remain subject to judicial review.[1]

Second, both Florida and Texas permit private discrimination suits, including suits challenging disparate impact discrimination under state fair housing acts modeled on § 3604. Tex. Prop. Code § 301.151; Fla. Stat. §760.35. The Texas FHA was enacted to "provide rights and remedies substantially equivalent to those granted under federal law." Tex. Prop. Code § 301.002(3). Similarly, Florida state courts have held that the Florida FHA, like §3604, prohibits both

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[1] It is hard to take seriously Allstate's assertion that, unlike state regulators, federal courts in disparate impact suits have "no broad warrant to consider the public interest" and focus only on the particular litigants before the court. (Pet. 18) This Court "has long recognized" that the "public policy" implications of court decisions are present in almost every case. *E.g., Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 401, 403 (1981).

intentional discrimination and incidental (*i.e.*, disparate impact) discrimination. *Dornbach v. Holley*, 854 So. 2d 211, 213 (Fla. App. 2002). Thus, the federal FHA does not interfere with state regulatory regimes and is not preempted because it complements state FHA remedies.

Third, the Fifth Circuit panel correctly applied *Humana*, 525 U.S. at 308-12. Under *Humana*, preemption is not required in this case because no state law, regulation, declared state policy or administrative regime requires, condones or approves Allstate's discriminatory credit formula. To the contrary, both Florida and Texas law prohibit race discrimination in the sale of insurance. Fla. Stat. §§ 624.155(1)(a) & (7), 626.9541(1)(x)1, 626.9631; Tex. Ins. Code art. 21.21 § 8; art. 21.21-6 § 3(a).

Fourth, the panel is not in conflict with the Seventh Circuit, which has twice rejected preemption of §3604 disparate impact claims. *NAACP v. American Family Mut. Ins. Co.*, 978 F.2d 287, 297 (7th Cir. 1992); *United Farm Bureau Mut. Ins. Co. v. Metropolitan Human Relations Com'n*, 24 F.3d 1008, 1016 (7th Cir. 1994). Allstate's reliance on *Doe v. Mutual of Omaha Ins. Co.*, 179 F.3d 557 (7th Cir. 1999), is misplaced. There, the Seventh Circuit recognized that, unlike the ***content*** of a policy, an insurer's discriminatory conduct affecting ***access*** to insurance is not preempted: "There is, as we have pointed out, a difference between refusing to sell a health-insurance policy at all to a person with AIDS, or charging him a higher price for such policy . . . on the one hand, and, on the other, offering insurance policies that contain caps for various diseases . . . ." *Id.* at 563. "But thus limited to a simple prohibition of discrimination, section 302(a) does not impair state regulation of insurance . . . ." *Id.* at 564.

Last, but not least, the record does not even present, let alone support, the disparate impact theory advanced in the petition. This interlocutory appeal arises from the denial of

Allstate's motion to dismiss respondents' complaint. Despite the early stage of the proceedings, Allstate's petition describes as fact the insurance industry's pricing and underwriting of homeowners insurance. But the petition is unsubstantiated by record citation, record evidence, or indeed any evidence. (Pet. 2-6)

For example, Allstate frames the issue and repeatedly asserts that its credit scoring practices are "race-neutral" and actuarially "sound." (Pet. i, 9, 16, 28) But respondents' complaint alleges that Allstate's credit formula is "racially discriminatory," and a "pretext" for placing non-Caucasians in high rate policies—and thus anything but race-neutral. (R4-5, 8 ¶¶ 14-17, 27-28)[2] The complaint further alleges that Allstate has "refused to disclose any legitimate actuarial basis" for its credit formula and had "vigorously opposed" state "regulatory efforts" to discover the formula. (R5 ¶ 16, R8 ¶ 28) The district court found these allegations were not disputed by Allstate. (R160 n.1)

At the pleading stage, it is improper for Allstate to inject factual assertions that have no basis in the record. *Scheuer v. Rhodes*, 416 U.S. 232, 249-50 (1974) (holding lower courts "erroneously accepted as a fact" matters not in evidence). Rather, the complaint's factual allegations must be accepted as true and "construed favorably to the pleader." *Id.* at 236; *Leatherman v. Tarrant County Narcotics Intelligence & Coordination*, 507 U.S. 163, 164 (1993). Allstate's asserted new "facts" do not exist at this stage. *Scheuer*, 416 U.S. at 249-50. This Court's decision in *Humana*, 525 U.S. at 304, arose on summary judgment—with a full factual record. Here, no evidence was presented that state regulatory regimes were impaired.

The record is deficient for another reason. Allstate's motion to dismiss made a blanket "field preemption" attack

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[2] "R" = The original record on appeal in the Fifth Circuit.

on all of plaintiffs' discrimination claims, but raised no separate theory for disparate impact claims until its reply below (R35-53, 151-55)—which is too late and waives the issue. *Yohey v. Collins*, 985 F.2d 222, 225 (5th Cir. 1993). Neither did the district court separately address disparate impact preemption or certify that question for interlocutory appeal. (R159-67, 216) The Fifth Circuit noted the "new" theory, and only addressed the merits briefly. (App. 10a-n.5) Ordinarily this Court does not pass on questions not de cided in the lower courts. *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 688 n.30 (1979); *Glover v. United States*, 531 U.S. 198, 205 (2001).

STATEMENT OF THE CASE

1. Respondents are Hispanic-American and African-American policy owners of petitioner Allstate's automobile and homeowners insurance. Respondents filed a complaint seeking relief under the civil rights laws, 42 U.S.C. §§ 1981, 1982 and 3604, alleging that Allstate engaged in a nationwide scheme of racial discrimination. Respondents allege that, beginning in the early 1990s, Allstate used racially slanted credit formulas to place its non-Caucasian policyholders in higher risk rate classifications for auto and homeowners insurance, based on credit rather than risk. (R1 ¶ 1, R4-5 ¶¶ 13-15) Respondents' complaint mainly alleges that Allstate engaged in intentional discrimination, but also includes an alternative claim under §3604 for disparate racial impact. (R4-5 ¶ 14, R18-20 ¶¶ 80, 88, 94)

The complaint details that Allstate's current credit scoring is a continuation of its earlier discriminatory "redlining" policy, an underwriting practice through which Allstate established geographical districts to identify non-Caucasian neighborhoods. Allstate then placed applicants living in such areas in higher premium policies because of their race. (R4 ¶ 15, R13-14 ¶¶ 55, 61) Beginning in the early 1990s, when

redlining fell into disrepute and under judicial scrutiny, Allstate turned to credit scoring to accomplish the same discriminatory purpose. Allstate obtained credit reports on applicants for insurance and used the credit scores as an underwriting criterion ostensibly to assess an applicant's "financial stability." The complaint alleges Allstate uses the credit scores it obtains as a pretext to identify non-Caucasians in order to charge them higher premiums. (R4-5 ¶ 15) Specifically, the credit score, which respondents allege has no reasonable relationship to risk of loss, is used by Allstate to justify the placement of non-Caucasian applicants in high risk, more expensive policies. (R4-6 ¶¶ 15, 16, 20, 21) As a result, non-Caucasians are paying higher discriminatory premiums unrelated to their level of risk. (R6 ¶¶ 20-21)

The complaint further alleges that Allstate has concealed its credit formula, not only from the public, but from its own agents, and most importantly, from state regulators. (R5 ¶ 16, R8 ¶ 28) The district court found this allegation undisputed. (R160 n.1)

2. Allstate moved to dismiss the complaint. The motion advanced a broad "field" preemption attack on all of respondents' civil rights claims. Allstate contended that the Act preempted all such claims because the states' administrative regimes comprehensively regulated insurance rate-making. (R34, 39-42) Allstate made no separate issue of respondents' alternative disparate racial impact claims under § 3604, except for a throw-away sentence in the last paragraph of its motion. That sentence asserted that plaintiffs' claim of disparate impact, even if proven, required inquiry into whether Allstate's credit practices had a legitimate business purpose, which was an issue solely for state insurance regulators. (R52-53) But that point was buried within Allstate's contention (rejected by the district court) that respondents' complaint did not allege sufficient facts to sustain its intentional discrimination claim. *Id.*

Because Allstate did not raise the issue, respondents did not separately address disparate impact in their opposition, except to mention they had such an alternative claim. (R115 n.2)

For the first time in its reply, Allstate presented at length a new contention that respondents' disparate impact claim was preempted because it would interfere with the state's administrative regime regulating insurance ratemaking—including credit scoring. (R151-55) Allstate ignored its own tacit acknowledgment that since 1990 neither Florida nor Texas regulated credit scoring. At most, Allstate said these states had initiated investigations of insurer credit practices in 2002—to determine whether to regulate. (R38-39) Allstate also ignored the complaint's allegation that Allstate has actively concealed its credit practices from state regulators. (R8 ¶ 28)

3. Applying this Court's decision in *Humana*, 525 U.S. 299, and decisions from three other circuits, the district court ruled that respondents' federal civil rights claims under 42 U.S.C. §§ 1981, 1982 and 3604, were not reverse preempted under the McCarran-Ferguson Act, 15 U.S.C. § 1012(b)—but certified its order for a 28 U.S.C. § 1292(b) appeal. (R162-65)

The district court reasoned that Allstate did not identify any Texas or Florida law, regulation or decision "requiring" or "condoning" credit scoring or "committing to insurers all decisions about credit-scoring" or stating that credit scoring "does not violate state law." (R163) The court accepted Allstate's concession that Florida and Texas had initiated investigations of credit scoring (R138-39), and found that no official of those states had appeared to argue that the federal civil rights claim "would frustrate any state policy." (R164) The court added that Allstate did not dispute the allegation that it has never disclosed its credit scoring formula to state regulators. (ER 160 n.1) The court distinguished *Doe*, 179 F.3d 557, as a case involving the "content" of a disabled

person's insurance policy, not "access" to insurance as in this case—which the Seventh Circuit held included "charging him a higher price." *Id.* at 560. (ER 165) The district court did not separately address or certify the disparate impact theory raised in Allstate's reply.

4. On interlocutory appeal to the Fifth Circuit, the panel held that none of respondents' claims were preempted. Judge Jones concurred with Judges Benavides and Davis that respondents' intentional race discrimination claims under §§ 1981, 1982 and 3604 were not preempted by the McCarran-Ferguson Act. (App. 2a, 13a) Allstate does not seek certiorari on that ruling. Judge Jones dissented only as to respondents' alternative claim of disparate racial impact under § 3604. (App. 13a-18a) Allstate's petition is limited to that claim.

The panel majority viewed Allstate's contention—that if respondents proved disparate impact, the district court would be required to act as "super actuary" in deciding whether Allstate's credit scoring is justified by "business necessity" —as a "new theory" that had not been preserved. (App. 10a & n.5) The majority nevertheless addressed the issue. The majority pointed out that Allstate's (and Judge Jones') parade of horribles were "entirely conjectural" because no evidence of impaired state regulation was before the court at the motion to dismiss stage. (App. 11a & n.7) The majority reasoned federal courts were well-acquainted with issues of business necessity in discrimination cases, and in any event, federal civil rights laws were "in harmony" with state laws which also prohibit race discrimination in insurance pricing. (App. 9a-12a)

The panel majority also addressed Allstate's contention that respondents' claims would impair state law by interfering with the state's administrative regime. (App. 8a, 10a) The panel held that Allstate had not identified any state law, policy, decision, regulation or regime that requires or con-

dones the use of credit scoring to "place" non-Caucasians in more expensive policies than Caucasians. (App. 11a) The panel reasoned that Allstate did not identify the administrative policy or regime that was impaired, but instead, advanced a "field preemption" theory that all federal civil rights claims would interfere with the states' regulation of insurance ratemaking. (App. 10a-12a) To the panel majority, *Humana* rejects such a "field preemption" interpretation of the Act based on a state having a general scheme of regulation of insurance ratemaking in place. Rather, the panel held that *Humana* requires identification of a specific state insurance regulatory goal that is hampered by application of civil rights law—which Allstate failed to do. (App. 12a)

REASONS FOR DENYING CERTIORARI PETITION

A. The Question Presented by the Petition Is Not of Exceptional Importance, Nor Does the Record Raise the Question Presented, When Allstate Has Never Disclosed Its Race-Based Credit Formula to State Regulators, and No State Objected that Respondents' Suit Interfered with Its Regulatory Regime

Allstate contends that the issue presented is of exceptional importance. Allstate rationalizes that if plaintiffs' disparate impact claim is not preempted, a federal court may be asked to determine whether the use of credit scoring is a "business necessity," which may conflict with a state's hypothetical determination of the same issue in the future. (Pet. 18)

Allstate's theory is hypothetical because it has acknowledged throughout these proceedings that neither Texas nor Florida had laws, regulations or policies regulating credit scoring when this suit was filed. At most, Allstate said the states were "investigating" whether credit scoring was an issue that required regulation. (AOB 13-14) Such pre-

liminary investigation is not regulation, let alone a state regulatory regime covered by the McCarran-Ferguson Act. Moreover, as the district court found, Allstate has never disclosed its credit formula to the state for regulation. (R160 n.1)

More importantly, no state regulator has appeared in this case to protest that the federal suit interferes with state regulatory policy. That lack of protest totally negates Allstate's assertion that respondents' civil rights suit "interferes" with the state's administrative regime. *Humana*, 525 U.S. at 313-14. The McCarran-Ferguson Act protects state insurance regulators, not insurers who evade regulation and also seek to evade judicial scrutiny of racial discrimination.

Further, Allstate's assertion that respondents' disparate impact claim interferes with state insurance ratemaking regulation is purely conjectural at the pleading stage. No facts have been developed to demonstrate any interference. It is improper to inject facts at the pleading stage; Allstate must await trial or summary judgment as in *Humana*, 525 U.S. at 304. *Scheuer*, 416 U.S. at 249-50.

For example, Allstate asserts that state regulators have already "approved or accepted" insurance rate structures and "concluded" they "did not result in unfair discrimination under state insurance law." (Pet. 14) There is no evidence or record reference to substantiate that. To the contrary, the complaint alleges, and the district court found undisputed, that Allstate never disclosed its credit formula to Florida or Texas, that neither state addressed credit practices as part of their regulation of rates (but were only investigating whether to regulate), and both states prohibit and allow suits for race discrimination—including disparate impact in the sale of insurance. (R5 ¶ 16, 8 ¶ 28, 160 n.1)

Similarly, Allstate's assertion that state regulators might allow disparate impact in insurance rates as a "public good" (Pet. 18), has no basis. No record citation appears. *Id.* In fact, as detailed in this opposition, state insurance laws prohibit race discrimination in insurance sales and state fair housing laws prohibit and allow suits for disparate racial impact. This Court has repeatedly emphasized that suits designed to remedy race discrimination are in the public interest: "The law now reflects society's consensus that discrimination based on the color of one's skin is a profound wrong of tragic dimension. Neither our words nor our decisions should be interpreted as signaling one inch of retreat from Congress' policy to forbid discrimination in the private, as well as the public sphere." *Patterson v. McLean Credit Union*, 491 U.S. 164, 188 (1989). Federal civil rights laws are viewed by this Court as providing "[a] unique remedy" broadly enforceable in federal courts that is "'supplementary to any remedy any State might have.'" *Owens v. Okure*, 488 U.S. 235, 248 (1989) (citations omitted).

In any event, as previously discussed, federal courts would examine an insurer's business necessity defense and evidence of disparate impact in adjudicating claims of intentional discrimination. *McDonnell Douglas*, 411 U.S. at 802-05; *Washington*, 426 U.S. at 242. Allstate is simply wrong in asserting such issues would escape judicial scrutiny by preemption of respondents' disparate impact claim.

Finally, Allstate did not raise a separate disparate impact theory in its motion to dismiss, but only in its reply. The district court did not address it and the Fifth Circuit addressed it briefly noting the "new" theory. (App. 10a & n.5) As such, Allstate waived the issue. *Yohey*, 985 F.2d at 225 ("This Court will not consider a claim raised for the first time in a reply brief."). This Court ordinarily declines to take up issues not passed upon below. *Glover*, 531 U.S. at 205.

B. Plaintiffs' Disparate Impact Claim Under 42 U.S.C. § 3604 Is Not Preempted When State Laws Also Permit Private Discrimination Suits, Including Disparate Impact Claims Under State Fair Housing Laws Modeled on the Federal Statute

Allstate (and Judge Jones) also overlook the fact that both Texas and Florida permit private racial discrimination suits, including claims for disparate impact under state fair housing acts modeled on the federal FHA.

Florida law provides that "[a]ny person may bring a civil action against an insurer when such person is damaged" by a violation of certain other statutory provisions. Fla. Stat. § 624.155(1)(a). One of those provisions involves race discrimination in the sale of insurance as an unfair trade practice: "the refusal to insure, or continue to insure, any individual or risk solely because of: race, color . . . ." Fla. Stat. § 626.9541(1)(x)1. Consistent with *Humana*, 525 U.S. at 312, Florida insurance law is "not hermetically sealed." Florida law makes clear that even its civil suit remedy under § 624.155, does ***not*** preempt other civil remedies: "The civil remedy specified in this section does not preempt any other remedy or cause of action provided for pursuant to any other statute or pursuant to the common law of this state." Fla. Stat. § 624.155(7). Neither do Florida administrative remedies bar civil suits: "The provisions of this part are cumulative to rights under the general civil and common law, and no action of the department commission, or office shall abrogate such rights to damages or other relief in any court." Fla. Stat. § 626.9631.

Similarly, Texas insurance law bars race discrimination and does not foreclose private suits. Texas explicitly provides administrative sanctions for race discrimination by defining "unfair discrimination" to mean: "Refusing to insure, refusing to continue to insure; limiting the amount, extent, or kind of coverage available; ***or charging an individual a***

different rate for the same coverage because of race, color, religion, or national origin." Tex. Ins. Code art. 21.21-6 § 3(a) (emphasis added).

Contrary to Allstate's assertions throughout this litigation, article 21.21-6 § 4(a) of the Texas Insurance Code does not authorize an insurer to advance a defense to racial distinctions in insurance rates "based upon sound underwriting or actuarial principles." Art. 21.21-6 § 4(a), which allows for an actuarial defense, cross-references only §§ 3(b) and 3(c), of article 21.21-6, covering age, gender, marital status and disability discrimination—but does not cross-reference § 3(a) of article 21.21-6, which prohibits discrimination "because of race, color, religion, or national origin." Thus, contrary to Allstate's assertion (Pet. 19), under Texas law, there is no actuarial defense to race discrimination claims, whether based on intentional discrimination or disparate impact.

Further, nothing in article 21.21-6 provides that the administrative penalty is an exclusive remedy for race discrimination in the sale of insurance. To the contrary, Texas Insurance Code article 21.21 § 8 provides: "No order of the Board under this Act . . . shall in any way relieve or absolve any person affected by such order from any liability under any other laws of this state." Citing § 8 of article 21.21, the Texas court of appeals long ago rejected Allstate's assertion that the State Board of Insurance has "exclusive" power to regulate insurance. *Attorney General of Texas v. Allstate Ins. Co.*, 687 S.W.2d 803, 805 (Tex. App. 1985).[3] Thus, like Florida, Texas law is not hermetically sealed. *Humana*, 525 U.S. at 312.

More importantly, both Florida and Texas expressly allow private suits for disparate impact discrimination. The Florida FHA (Fla. Stat. § 760.35) contains provisions "substantively

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[3] Tex. Ins. Code art. 21.21 § 8 is different from Tex. Ins. Code art. 21.21-8, cited by Allstate. (Pet. 19 n.18)

identical" to the federal FHA. *Loren v. Sasser*, 309 F.3d 1296, 1299 n.9 (11th Cir. 2002), *cert. denied*, 538 U.S. 930 (2003). Florida courts confirm that "[t]he Florida Legislature essentially codified the Federal Act when it enacted the Florida Fair Housing Act." *Dornbach*, 854 So. 2d at 213. Thus, Florida courts have held that, like federal law, the state FHA prohibits both intentional discrimination and "incidental discrimination"—*i.e.*, disparate impact discrimination. *Id.*

Likewise, the Texas FHA explicitly states: "The purposes of this chapter are to . . . provide rights and remedies substantially equivalent to those granted under federal law." Tex. Prop. Code §301.002(3). The Fifth Circuit has recognized that the Texas FHA codified the federal FHA. *Meadowbriar Home for Children v. Gunn*, 81 F.3d 521, 531 n.8 (5th Cir. 1996). No Texas courts have in any way indicated they would depart from federal interpretation of these discrimination laws. Accordingly, the Texas FHA permits disparate impact suits.

Although Florida and Texas have recently passed laws allowing limited credit scoring on insurance policies written after January 1, 2004, the Fifth Circuit recognized that those provisions do not apply retroactively to respondents' claims that all arose prior to 2004. (App. 9a & n.5) Equally important, both of the new state statutes contain provisions prohibiting race discrimination in the use of credit scoring. Fla. Stat. § 626.9741(4)(a) ("An insurer may not request a credit report or score based upon the race, color . . . national origin ... of the applicant or insured."); Tex. Ins. Code art. 21.49-2U § 3(a)(1) ("[a]n insurer may not use a credit score that is computed using factors that constitute unfair discrimination"). In Texas, "unfair discrimination" includes "charging an individual a different rate for the same coverage because of race, color, religion, or national origin." Tex. Ins. Code art 21.21-6 § 3(a). Thus, federal civil rights laws would continue to complement state law as recently amended.

C. The Fifth Circuit Correctly Applied This Court's Decision in *Humana* in Holding that Plaintiffs' Federal Civil Rights Claims Complement, and Do Not Frustrate, Conflict or Interfere with State Regulators Whose Laws Also Prohibit Race Discrimination in Insurance Sales

The panel decision correctly applies the Supreme Court's decision in *Humana*, 525 U.S. 299, interpreting the McCarran-Ferguson Act, 15 U.S.C. § 1012(b). The statute provides that: "No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance . . . ." 15 U.S.C. § 1012(b).

As the panel correctly held (Op. 4), *Humana*, explicitly rejected "any sort of field preemption" that would free insurance companies from federal law just because the states regulated insurance generally or regulated insurance rates generally. 525 U.S. at 309. *Humana* also rejected the "polar opposite" view that federal law was preempted only when in "direct conflict" with "state regulation." *Id.* at 309-10. Rather, the Supreme Court adopted a middle course that included direct conflict in the test, but also other factors: "When federal law does not directly conflict with state regulation, and when application of the federal law would not frustrate any declared state policy or interfere with a State's administrative regime, the McCarran-Ferguson Act does not preclude its application." *Humana*, 525 U.S. at 310.

The requirement that a particular state law or regulation or "declared state policy" be identified is confirmed by *Moore v. Liberty Nat'l Life Ins. Co.*, 267 F.3d 1209, 1221-23 (11th Cir. 2001) (federal civil rights laws did not "frustrate any declared state policy," because no state law "required, condoned, or suggested that racial distinctions" in selling insurance are acceptable). In trying unsuccessfully to distinguish *Moore*,

Allstate told the Fifth Circuit—without support—that Alabama had and has no administrative regime regulating life insurance rates. (En Banc Pet. 7) Allstate's assertion is contradicted by the insurer in *Moore*, who contended that Alabama had a "carefully crafted scheme of insurance regulation." *Moore*, 267 F.3d at 1220 (holding the state scheme did not condone race discrimination).

Allstate misreads *Humana* (and the panel opinion) in asserting that no "declared (state) policy" or "any enacted (state) law" is required to determine preemption. In fact, "frustrate any declared state policy" are the exact words used by this Court—three times. *Humana*, 525 U.S. at 303, 310, 311. And, the McCarran-Ferguson Act plainly states "any law enacted by any State." 15 U.S.C. § 1012(b). Allstate errs in disregarding plain statutory language.

D. The Fifth Circuit Decision Is Consistent with the Decisions of the Fourth, Sixth, Seventh and Eleventh Circuits and the Conflict Alleged to Exist with the Seventh and Third Circuits Does Not Exist

Contrary to Allstate's assertion, neither the Seventh Circuit nor the Third Circuit has held that FHA disparate impact claims are preempted under the McCarran-Ferguson Act. Allstate relies mainly on *Doe*, 179 F.3d 557. (Pet. 25-27)

In fact, two Seventh Circuit cases upheld suits under § 3604 against McCarran-Ferguson Act preemption. In the *NAACP* case, the Seventh Circuit held that a § 3604 claim was not preempted absent a Wisconsin "law, regulation, or decision" either "requiring redlining, condoning that practice, committing to insurers all decisions about redlining, or holding that redlining with discriminatory intent (***or disparate impact***) does not violate state law." *NAACP*, 978 F.2d at 297 (emphasis added). That decision was reaffirmed by the Seventh Circuit in *United Farm Bureau*, 24 F.3d 1008. The court there held that a federal redlining suit against an Indiana

insurer based on an FHA claim was not preempted by the Act because Indiana did not "require or condone" redlining. *Id.* at 1016.

That brings us back to *Doe*. There, the Seventh Circuit held that the federal disabilities laws were preempted with respect to the "content" of medical insurance policies regulated by the state. *Doe*, 179 F.3d at 563-64. But, the court in *Doe* emphasized that the anti-discrimination provisions of the federal disabilities laws were not preempted as to "access" to insurance—including price. Insurers may be sued for "refusing to sell"—including charging "a higher price." *Id.* at 563. As Judge Posner explained: "Remember that the right of full and equal enjoyment as we interpret it includes the right to buy on equal terms and not just the right to enter the store." *Id.* at 562.[4]

Thus, the Fifth Circuit majority decision is consistent with *Doe* in holding there is no preemption of federal race discrimination claims against insurers for charging higher premiums based on race. The Third Circuit decision in *Ford v. Schering-Plough Corp.*, 145 F.3d 601 (3d Cir. 1998), is similarly inapposite. It too dealt with the content of a plan, not access to disability insurance—and never addressed disparate impact claims.

Finally, the Fifth Circuit decision is also consistent with decisions in other circuits holding that the Act does not preempt federal civil rights suits, including § 3604 claims, where, as here, state law did not approve or condone race

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[4] *Doe* reversed a district court decision in Illinois where a state statute barred distinctions in health insurance benefits based on disability "except" where based on "sound actuarial principles." *Doe v. Mutual of Omaha Ins. Co.*, 999 F. Supp. 1188, 1196 (N.D. Ill. 1998). By contrast, race-based distinctions are not condoned by actuarial defenses. As noted earlier, Texas too permits "actuarial" justification but only for disability, age and gender disparities—not race. Tex. Ins. Code art. 21.21-6 §§3-4.

discrimination in the sale of insurance. *Mackey v. Nationwide Ins.*, 724 F.2d 419, 421 (4th Cir. 1984); *NAACP*, 978 F.2d at 297; *Nationwide Mut. Ins. Co. v. Cisneros*, 52 F.3d 1351, 1363 (6th Cir. 1995); *Moore*, 267 F.3d at 1220. Thus, there is no circuit conflict.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

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IN THE

Supreme Court of the United States

ALLSTATE CORPORATION, *et al.*,
Petitioners,

v.

JOSE C. DEHOYOS, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

1. Respondents, Like The Court Of Appeals, Ignore The Third Prong Of *Humana* 1

2. Disparate-Treatment And Disparate-Impact Suits Are Not Equivalent 4

3. State Law Offers Respondents No Support 6

4. The MFA Question Is Properly Presented And Warrants Review 9

TABLE OF AUTHORITIES

CASES

Page(s)

Barnett Bank of Marion County, N.A. v. *Nelson*, 517 U.S. 25 (1996) 7
Castano v. *American Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996) 10
Doe v. *Mutual of Omaha Insurance Co.*, 179 F.3d 557 (7th Cir. 1999) 3
Federated Department Stores, Inc. v. *Moitie*, 452 U.S. 394 (1981) 6
Ford v. *Schering-Plough Corp.*, 145 F.3d 601 (3d Cir. 1998) 3
Hazen Paper Co. v. *Biggins*, 507 U.S. 604 (1993) 5
Humana Inc. v. *Forsyth*, 525 U.S. 299 (1999) 1, 2
McDonnell Douglas Corp. v. *Green*, 411 U.S. 792 (1973) 5
Moore v. *Liberty National Life Insurance Co.*, 267 F.3d 1209 (11th Cir. 2001) 2
NAACP v. *American Family Mutual Insurance Co.*, 978 F.2d 287 (7th Cir. 1992) 4
Parker v. *Time Warner Entertainment Co., L.P.*, 331 F.3d 13 (2d Cir. 2003) 10
In re Rhone-Poulenc Rorer Inc., 51 F.3d 1293 (7th Cir. 1995) 10
TVA v. *Hill*, 437 U.S. 153 (1978) 6
United Farm Bureau Mutual Insurance Co. v. *Metropolitan Human Relations Commission*, 24 F.3d 1008 (7th Cir. 1994) 4
United States v. *Williams*, 504 U.S. 36 (1992) 9

STATUTES

McCarran-Ferguson Act, 15 U.S.C. § 1012(b) 1
Americans With Disabilities Act, 42 U.S.C. § 12182(a) 3
Tex. Ins. Code art. 21.21-6 7
Tex. Ins. Code art. 21.49-2U § 9 9
Tex. Ins. Code art. 21.49-2U § 10 9

Tex. Ins. Code § 36.152 9

BOOKS

Henry J. Friendly, *Federal Jurisdiction: A General View* (1973) 10

In our petition, we pointed out (Pet. 22-25) that the court of appeals failed to apply the third prong of this Court's test in *Humana Inc.* v. *Forsyth*, 525 U.S. 299 (1999), for application of Section 2(b) of the McCarran-Ferguson Act (MFA), 15 U.S.C. § 1012(b), and that, as a result, the court of appeals failed to perceive the serious disruption of state insurance regulation that would be caused by extending disparate-impact liability under federal law to the pricing of insurance. Respondents replicate the court of appeals' mistake. But respondents step even further into error: they also argue that there is no real difference between disparate-treatment claims and disparate-impact claims, and that Texas law would allow disparate-impact claims to go forward in any event. As we show below, these contentions lack merit. Also without merit is respondents' argument that the issue of preemption of disparate-impact claims is not properly before the Court.

1. Respondents, Like The Court Of Appeals, Ignore The Third Prong Of *Humana*

In *Humana*, this Court held that a federal law may be applied to insurance only when "[1] federal law does not directly conflict with state regulation, and when [2] application of the federal law would not frustrate any declared state policy or [3] interfere with a State's administrative regime." 525 U.S. at 310 (bracketed numerals added). Respondents correctly quote that test, but then, in the following sentence, ignore the third prong in arguing that *Humana* "require[s] that a particular state law or regulation or 'declared state policy' be identified." Opp. 16. *Humana* requires no such thing. Rather, as is evident from the passage quoted above, *Humana* made clear that, when a federal law "interfere[s] with a State's *administrative regime*," the MFA "preclude[s] its application." 525 U.S. at 310 (emphasis added).[1]

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[1] Respondents accuse petitioners of "misread[ing]" *Humana*, noting that " 'frustrate any declared state policy' are the exact words used by this Court—three times." Opp. 17. True enough—yet *all three times*, the

In so holding, the Court rejected the notion that "Congress intended a green light for federal regulation whenever the federal law does not collide head on with state regulation." *Id.* at 309-310. The Court recognized, rather, that in enacting the MFA, Congress intended to protect the primacy of the state regulatory *process* in the field of insurance, not just substantive state policy choices about insurance regulation. Accordingly, the MFA precludes impairment of the *system* of state insurance regulation.[2]

The court of appeals, like respondents, failed to apprehend this central point about the MFA. The court of appeals summarized the *Humana* test as "turn[ing] on one of two axes: (1) the existence of an express conflict with the letter of the state law; or (2) the frustration of an officially articulated state regulatory goal." Pet. App. 3a. The *Humana* test, however, has three prongs, not two, and the court of appeals failed to apply the third prong. To be sure, the mere *existence* of a system of state insurance regulation is not sufficient for preemption under the MFA; if it were, then no federal law not specifically directed at insurance could ever be applied to insurance, for every State has in place an administrative regime for the regulation of insurance. Preemption thus turns on whether the state administrative system will be *impaired*. *See* Pet. 23. The court of appeals majority failed to grapple with this inquiry at all, as Judge Jones noted in dissent (Pet. App. 13a-19a).

Other courts of appeals have recognized that extending federal disparate-impact liability to insurance would have an enormously disruptive effect on state insurance regulation.

Court followed those words with the test's third prong, twice stated as "interfere with a State's administrative regime" and once as "disturb the State's administrative regime." 525 U.S. at 303, 310, 311.

[2] Respondents cite *Moore* v. *Liberty National Life Insurance Co.*, 267 F.3d 1209 (11th Cir. 2001), to support their elision of the third prong. But *Moore* specifically examined whether the relevant statutes "frustrate any declared state policy *or interfere with the state's administrative regime* in the insurance context." 267 F.3d at 1221 (emphasis added).

See Pet. 25-28 (discussing *Doe* v. *Mutual of Omaha Insurance Co.*, 179 F.3d 557 (7th Cir. 1999), and *Ford* v. *Schering-Plough Corp.*, 145 F.3d 601 (3d Cir. 1998), both of which concluded that the MFA precludes the application of disparate-impact liability under the Americans With Disabilities Act (ADA), 42 U.S.C. § 12182(a), to insurance-benefits caps). Respondents try, but fail, to minimize the force of those decisions. Respondents argue that the decision below "is consistent with *Doe* in holding there is no preemption of federal race discrimination claims against insurers for charging higher premiums based on race." Opp. 18. But this petition is *not* about "race discrimination claims . . . based on race," despite respondents' repeated and erroneous description of petitioners' credit-scoring practices as "race-based." *Id.* at 1, 3. Rather, this petition addresses only claims attacking *race-neutral* insurance practices devoid of racial animus that allegedly produced a disparate impact.

The distinction between race-based (or racially-motivated) and race-neutral practices parallels the line that the Seventh Circuit drew in *Doe* in the disability context. Judge Posner concluded that "to say that an insurance company may not refuse to deal with disabled persons" would not affront the MFA, because "the prohibition of such refusals can probably be administered with relatively little interference with state insurance regulation." *Doe*, 179 F.3d at 564. By contrast, "to require federal courts to determine whether limitations on coverage are actuarially sound . . . obviously would interfere with the administration of the state law" in violation of the MFA and the third prong of the *Humana* test. *Id.* Likewise, the Third Circuit in *Ford* held that an interpretation of the ADA that required insurers to prove the actuarial soundness of their insurance plan—as insurers would need to do in defending against any disparate-impact claim—would produce "a seismic shift in the insurance business, namely requiring insurers to justify their coverage plans in court after a mere allegation by a plaintiff." 145 F.3d at 612.

Respondents also err in stating that the Seventh Circuit has "twice rejected preemption of . . . disparate impact claims." Opp. 4 (citing *NAACP* v. *American Family Mut. Ins. Co.*, 978 F.2d 287 (7th Cir. 1992) and *United Farm Bureau Mut. Ins. Co.* v. *Metropolitan Human Relations Comm'n*, 24 F.3d 1008 (7th Cir. 1994)). This is flatly wrong. Those cases—both of which applied the direct-conflict test rejected in *Humana*—held only that *intentional* discrimination claims were not preempted. Furthermore, the *NAACP* court went out of its way to "assume that the plaintiffs can establish disparate treatment and not just a disparate impact of decisions made on actuarial grounds." 978 F.2d at 290.[3] Judge Easterbrook declined to consider a disparate-impact theory under the Fair Housing Act (FHA) because of "the nature of insurance," which "works best when risks in the pool have similar characteristics." *Id.* Noting that "[r]isk discrimination is not race discrimination," Judge Easterbrook suggested that disparate-impact suits, by placing the burden of proving actuarial justification upon the defendant insurer, are ill-suited to the insurance context. *Id.* at 291. The court below, however, failed to apprehend this important point.

2. Disparate-Treatment And Disparate-Impact Suits Are Not Equivalent

Respondents suggest that disparate-treatment lawsuits are essentially equivalent to disparate-impact suits, and thus

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[3] *United Farm Bureau* also addressed only a disparate-treatment claim, finding no preemption of a policyholder's claim that his insurer "declined to renew his policy because he lived in a racially mixed neighborhood with a perceived high crime rate." 24 F.3d 1008, 1010, 1016. The plaintiff thus alleged that the decision not to insure was based on the racial character of the neighborhood. That is a disparate-treatment claim, not a disparate-impact claim. All the other court of appeals decisions that respondents cite (Opp. 19) also involved claims of intentional discrimination, not disparate impact. *See* Pet. 25. Furthermore, with one exception (*Moore*), each case predates *Humana* and its rejection of the direct-conflict test.

there is no need for particular concern about the disruption of state regulation that would be caused by application of disparate-impact liability to insurance. Respondents argue, for example, that even in a disparate-treatment case, "business necessity would remain subject to judicial review." Opp. 3; *see also* Opp. 12.

Respondents blur the fundamental distinction between disparate-treatment and disparate-impact suits. If a disparate-treatment plaintiff establishes a *prima facie* case that the defendant acted with an improper motive, the burden shifts to the defendant to articulate only a "legitimate, nondiscriminatory reason" for the challenged action. *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802 (1973). The disparate-treatment defendant need only show that its motive was not a prohibited one—not that its action was a necessary or even a sensible business move. *See Hazen Paper Co.* v. *Biggins*, 507 U.S. 604, 612 (1993) (making clear that, in responding to *prima facie* case, employer may rely on any reason not prohibited by the statute). In other words, the defendant need not show that it *must* undertake the challenged action, but rather that it *may*.

By contrast, a disparate-impact inquiry requires a jury to sift through complex actuarial data to determine whether the defendant *needed* to use credit scoring—or any other ratemaking factor that a plaintiff might challenge. And even if the insurer could meet that burden, jurors would next have to evaluate the plaintiff's proffer of an alternative methodology that did not involve the challenged factor, and would need to determine whether that method would at once (1) reduce the disparate impact, (2) comparably serve the insurer's business needs, and (3) comply with state law. The complexity and intrusiveness of this inquiry could not be more different from the simple motive examination employed in cases of intentional discrimination. As such, asking jurors to undertake it will generate constant, repeated interference with state administrative regimes. *See* Pet. 16-18.

Moreover, because state insurance regulators exercise quasi-legislative powers, they can balance concerns about